U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: APR 0 2 2009

SRC 06 252 50273

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation claiming to be engaged in the operation of a convenience store/gas station.[1] The petitioner seeks to employ the beneficiary as its president/managing director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on the finding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel submits an appellate brief disputing the director's observations and ultimate finding with regard to the ground for ineligibility. The AAO will address the director's findings and counsel's arguments in a full discussion below.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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[1] *See* Part 5, No. 2 of the petitioner's Form I-140.

The primary issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated August 15, 2006, which included the following description of the duties to be performed by the beneficiary under an approved petition:

- Develop current business establishment and use entrepreneurial skills to acquire new establishments.
- Set goals for [the] business by coordinating financial planning and directing marketing and sales efforts.
- Analyze complex situations, design practical solutions and implement business plans.
- Develop personnel and improve sales.

On November 27, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to clarify the beneficiary's qualifying employment with the U.S. entity. Specifically, the petitioner was asked to disclose the number of employees it has and to discuss how those employees support the beneficiary in a qualifying capacity. With regard to one of the businesses partly owned by the petitioner, i.e., [redacted], the director asked the petitioner to discuss the employees who work at the liquor store and to explain how they support the beneficiary in a qualifying capacity.

In response, the petitioner provided the beneficiary's daily/weekly executive task schedule, which included the following breakdown of time to be spent on individual duties and responsibilities:

- Read [*The*] *Wallstreet Journal*[.] 30 minutes
- Confer with [the petitioner's] store operators in Delaware and Florida[.] 1 to 1.5 hours
- Teleconference with [the] operation in Africa[.] 1 to 1.5 hours
- Review financial documentation[.] 25 minutes
- Analyze financial documentation[.] 15 minutes
- Identify market trends of retail customers[.] 2 to 3 hours per week
- Identify new retail products[.] 1 hour per week
- Meet with focus groups to identify consumer needs and behavior[.] 3 to 4 hours per months [sic]
- Attend chamber of commerce meetings to network[.] 2 hours per week
- Establish internal control procedures[.] 1 hour

- Preside over teleconference meetings with partners[.] 2 hours per day
- Preside over teleconference meetings with vendors[.] 3 to 4 hours per week
- Negotiate contracts with vendors[.] 3 to 4 hours per week
- Develop and direct marketing efforts of [the] entire operation[.] 6 to 7 hours per week
- Screen, select, hire, [and] fire key employees[.] ongoing
- Establish responsibilities for key personnel[.] ongoing
- Evaluate company performance based on reports received[.] 2 hours
- Determine areas of cost reduction[.] 4 hours per week
- Implement business policies[.] ongoing
- Identify new business locations for acquisition[.] 3 hours per week
- Evaluate newly identified business opportunities for [the petitioner.] 4 hours per week

The petitioner also provided an organizational chart illustrating its own organizational hierarchy as well as its relationship to the businesses it has purchased in the United States. With regard to the former, the petitioner identified the beneficiary as president and executive director, [redacted] as a part-time administrative support employee, and [redacted] who is also listed as a manager in the organizational chart. It is noted that the petitioner provided copies of the 2006 W-2 statements it issued to all three of the employees named in its chart. However, the petitioner provided no explanation as to why [redacted] was listed in both the petitioner's organizational chart and in the organizational chart of [redacted] or why this individual's position title with the petitioner is that of [redacted] administrative support. In other words, the petitioner did not identify any specific contributions that [redacted] has made or would make to the petitioning entity such as to justify the petitioner's payment of wages to this individual.

On December 27, 2007, the director issued a decision denying the petition. The director noted that the petitioner's retail enterprise requires a staff to perform a number of non-qualifying operational tasks and that, absent evidence showing that the petitioner employs such a staff, it cannot be concluded that the beneficiary would primarily perform in a qualifying managerial or executive capacity. The director also addressed the breakdown of job duties submitted in response to the RFE, finding that the list was created by counsel and, therefore, was not in compliance with the provisions in 8 C.F.R. § 204.5(j)(5), which require that the petitioner provide a detailed description of the beneficiary's proposed job duties. After reviewing the referenced document, the AAO finds that there is insufficient basis for the director's conclusion. While it is apparent that the response letter

itself was written by counsel, there is no evidence that the supporting document listing the beneficiary's job duties was created by counsel as well. Therefore, the director's finding regarding this specific issue is hereby withdrawn. The AAO also finds that the director erred in his numerical calculation of the number of hours accounted for in the beneficiary's day. Specifically, the director stated that of the total number of hours designated with "per week" as the frequency with which those duties are performed, the petitioner only accounts for 31 hours of the beneficiary's work week. However, the AAO conducted its own independent review of the job duties and time allocations and has found that a minimum of 38 hours per week have been accounted for. As such, the director's observation in this regard is hereby withdrawn.

That being said, the director duly took note of the contents of the list of job duties attributed to the beneficiary's proposed employment and pointed out deficiencies that led to an otherwise sound decision. The director took proper note of a number of operational job duties that were outside the realm of what can be deemed as qualifying managerial or executive tasks and further pointed out the petitioner's failure to clarify how frequently the beneficiary would perform certain job duties by failing to indicate whether certain job duties would be performed on a weekly or daily basis.

On appeal, counsel focuses on the beneficiary's placement within the U.S. entity's hierarchy and his overall leadership role in making business decisions. Counsel also places great emphasis on the petitioner's purchase of an existing retail outlet that was fully staffed at the time of purchase and located in another state such that the beneficiary's daily performance of non-qualifying tasks was not necessary in such an instance. While the AAO takes full notice of both factors, it finds that neither is persuasive in overcoming the director's denial.

In determining whether a beneficiary would be employed in a qualifying capacity the AAO will first look to the petitioner's description of job duties. Therefore, while the AAO does not discount either the relevance of the beneficiary's leadership role or his place at the top of the petitioner's hierarchy, in addressing the overall issue of the beneficiary's employment capacity, these factors must be reviewed in light of the beneficiary's prospective job duties. In the present matter, the list of job duties that was provided in response to the RFE is deficient. Namely, the petitioner has attributed significant portions of the beneficiary's time to such non-qualifying job duties as identifying market trends and new retail products, meeting with focus groups, networking at chamber of commerce meetings, presiding over meetings with vendors, negotiating contracts, and developing marketing efforts. These non-qualifying, operational tasks would cumulatively consume at least 20 hours per week. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, while the petitioner identified itself as a convenience store/gas station at Part 5, item 2 of the Form I-140, this information apparently pertains to one of the businesses that the petitioner purchased. The record also shows that the petitioner purchased a liquor store. However, both businesses had a full staff and were doing business at the time the petitioner made the respective purchases. It is unclear what types of business activities, if any, the petitioner itself conducts on a daily basis. A review of the beneficiary's list of job duties suggests that the petitioner is a retail

business. However, there is no evidence that the petitioner is a retail operation that is separate and distinct from the retail conducted by the two businesses it has purchased. This lack of clarity brings into question the beneficiary's entire job description. In other words, whose market trends and retail products would the petitioner identify; which vendors would the beneficiary meet; and what types of contracts would he negotiate? The record does not establish that the petitioner's business activity goes beyond that which is conducted by the two businesses the petitioner has purchased, thereby indicating that the beneficiary would be primarily providing non-qualifying services to a liquor store and a convenience store/gas station. Given the organizational structure of the petitioner itself and the staffing of the petitioner's two businesses, there does not appear to be an established need for an employee that would be employed in a managerial or executive capacity as defined by the Act.

Furthermore, the AAO finds that there is at least one additional ground of ineligibility that was not previously addressed in the director's decision. Namely, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.,* 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular

business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); *see also New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. As explained above, the petitioner is a corporation, which the petitioner claims is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. He will control the organization; set the rules governing his work; and share in all profits and losses.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

As a final note, counsel makes a brief reference to the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions.

In addition, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS,* 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd,* 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.